No. 72-1061

Supreme Court of the United States

OCTOBER TERM, 1973

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS,
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus*, in support of the position of the respondent unions, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 113 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

STATEMENT OF THE CASE

The basic facts, as found by the court below, on the basis

of "stipulation or uncontroverted evidence" (A. 126), are as follows:

> "Four pickets [American-seamen-members of six American maritime unions] commenced picketing the Theomana [a cargo ship of Liberian registry] at the Port of Houston on October 28, 1971, and four began picketing the Northwind, [also of Liberian registry] the following day.
>
> Signs carried by the pickets bore the following message:
>
> 'ATTENTION TO THE PUBLIC
>
> The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.' (Parenthesis added).
>
> The signs bore the names of the picketing unions.* * * Longshoremen and other workmen would not cross these picket lines to service [the] vessels.
>
> * * *
>
> "The crews and officers of the vessels are foreign nationals. There is no labor dispute between the owners of the vessels and their crews or the foreign unions who represent them or on the foreign contracts under which they work. The picketing unions neither have nor claim the right to represent the crews, nor do they seek to obtain such right. None of the crew members are members of the picketing unions. The picketing has been peaceful and without violence or threat of violence.
>
> * * *
>
> "[The unions] picketed only when the vessels of the * * * primary employers, were dockside. Secondly, when picketed the ships were being loaded and un-

loaded, part of the usual operation of cargo ships and the normal business of the primary employers. Moreover, the picketing was limited to the dock at which the vessels were berthed. Further, the signs carried by the picketers clearly restricted the picketing to the primary employer. And, the two ships were the only reasonably accessible places of business to which the unions could direct their attention and efforts." A. 125-127, 130-131.

Thus, as the Texas courts recognized, the economic weapon employed here was peaceful, primary, non-recognitional, area standards picketing.[1]

ARGUMENT

The question presented is whether the legality of the Unions' picketing of the Theomana and the Northwind (described above) is to be determined on the basis of the provisions of the National Labor Relations Act, as amended, 29 USC §151 *et seq*, or on the basis of the law of Texas. The Texas courts held that the NLRA controls. A. 125-139. That holding is correct—as we now demonstrate.

1. It simplifies and sharpens analysis to first consider whether the NLRA governs the type of picketing here involved so as to exclude state law when directed at an

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[1] In determining whether the picketing was "primary" or "secondary" the court below applied the "guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N.L.R.B. 547 and adopted in Local 761, Inter. U. of E., R. and M. Wkrs. v. NLRB, 366 U.S. 667 (1961)." A. 130. As the above quoted passage shows, it found a lack of recognitional object as a matter of fact. And that court denominated the picketing as "area standards" on the basis of *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195. A. 131-132.

American-flag vessel paying substandard wages—a vessel which, in contrast to those flying a foreign flag, is concededly an "employer" in "commerce" as those terms are defined in §§2(2)[2] & (6)[3] of the Act.

"Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cen. Trades Council, 257 U.S. 184, 209, * * * an elimination of price competition based on differences in labor standards is the objective of any national labor organization." *Apex Hoisery Co.* v. *Leader*, 310 U.S. 469, 504. This economic imperative has impelled organized workers to protect the terms and conditions of employment they have won from their own employers, where other alternatives have failed, by peaceful picketing directed at substandard employers and seeking to persuade those who would deal with the

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[2] "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[3] "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

latter not to do so. See, e.g., *Senn v. Tile Layers*, 301 U.S. 468; *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308.

Such picketing when carried on by "employees," as that term is defined in §2(3)[4] of the Act, through their "labor organization," as that term is defined in §2(5)[5], and within the limits set by §8(b), is a paradigm expression of the §7 "right to • • • assist labor organizations to engage in other connected activity for the purpose of • • • mutual aid and protection;" and it is protected by §13, in which Congress "made it clear that • • • all • • • parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike [and picket, *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 281,

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[4] "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

[5] "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers covering grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

n.9] may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act" (*NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673). As stated in *Garner* v. *Teamsters*, 346 U.S. 485, a case in which organized employees, acting through their union, picketed an unorganized employer in an effort to have that employer's employees join the union "to gain union wages, hours and working conditions" (*id.* at 486-487), the "policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing" (*id.* at 499-500).

To be sure, §8(b) imposes substantial, albeit carefully limited, restrictions on the right of covered employees and their unions to picket the competitors of their employers. Section 8(b)(4)(B) prohibits "secondary activity," as that complex concept is defined by federal law (see n. 1, p. 3 *supra*). And, §§8(b)(4)(A),(B) & (C) and §8(b)(7) place stringent limitations on the right to engage in organizational picketing. But the Act does sanction primary picketing by such employees acting through their unions directed at competitors of their employers, where the object is to require the picketed employer "to conform [his] standards of employment to those prevailing in the area," so long as they do "not, in [their] conversation with the [picketed employer, their] letter[s] to [that employer], or [their] picket sign, claim to represent [his] employees, request recognition by [him], or solicit [his] employees to become [union] members." *Houston Bldg. and Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321, 323.

As this Court stated in *Teamsters Union* v. *Morton*, 377 U.S. 252, 259-260, where it held that the states could not utilize their own secondary boycott law to condemn union requests to an employer to cease doing business with another employer with whom the union had a dispute, since that conduct was lawful under the Act:

> "This weapon of self-help, permitted by federal law, formed an integral part of the [union's] effort to achieve its bargaining goals • • • Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v Labor Board, 366 US 667, 672, • • • If the [state] law • • • can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe • • • the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' Garner v Teamsters Union, 346 U.S. 485, 500."

Morton's rationale compels the conclusion that the states may not utilize their own law to interdict peaceful, primary, non-recognitional, area standards picketing by American seamen acting through their unions directed at an American-flag vessel paying substandard wages. Congress in enacting the NLRA, "focused upon" the right to engage in such picketing "but did not proscribe" it. And utilization of "this weapon of self-help, permitted by federal law," is "an integral part" of efforts to maintain

established conditions and to achieve future "bargaining goals." To allow state law "to proscribe the same type of conduct" would "frustrate the Congressional determination to leave this weapon of self-help available." 377 U.S. at 259-260. In sum, such picketing creates a "labor dispute"[6] which is regulated by the Act.

2. Against this background we turn to the question of whether peaceful, primary, non-recognitional, area standards picketing by American seamen acting through their unions directed at a foreign-flag vessel paying substandard wages likewise creates a labor dispute which is regulated by the NLRA.

(a) The Act does not regulate labor disputes between employers whom it does not cover and their own employees. Recognition or bargaining disputes between the United States, a State, a non-profit hospital, an employer covered by the Railway Labor Act, an agricultural employer, or an employer not in commerce, are not for the NLRB to decide. See §§2(2) & (6) of the Act. In *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, *McCulloch* v. *Marineros de Honduras*, 372 U.S. 10, and *Incres Steamship Co.* v. *Maritime Workers Union*, 372 U.S. 24, this Court "concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of §2(6)" of the

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[6] Under §(2)(9) of the NLRA:

"The term 'labor dispute' includes any controversary concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Act (*Incres*, 372 U.S. at 27). From that conclusion, and the general principle just noted, it followed, as the Court held, that questions concerning the representation of the crews of such vessels for the purposes of collective bargaining are not within the NLRB's jurisdiction, whether they arise by reason of a petition under §9 for a Board-conducted election, or by reason of an organizing campaign carried on through recognitional or organizational picketing (*McCulloch* and *Incres*); and, by the same token, that strikes and picketing by alien seamen over their own terms and conditions of employment are not regulated by §§7 & 8 of the Act (*Benz*). Nor, as all three cases make clear, is the coverage of the NLRA expanded if American unions seek to act as the collective bargaining representative of the alien seamen, or are in fact designated by those seamen as their representative. Thus, the holdings of *Benz*, *McCulloch* and *Incres* are precisely the same as those which would have resulted in a case arising out of a labor dispute between a domestic employer not covered by the Act and his own employees.

(b) The general rule that the NLRA does not regulate labor disputes between a non-covered employer and his own employees does not mean that the Act has nothing to say with regard to a labor dispute between, on the one hand, covered employees and their unions and a non-covered employer on the other. There are a variety of situations in which, although the employer is not covered by the NLRA, a labor dispute in which he is involved, is regulated by the Act, because the dispute is precipitated by concerted activity by employees of a covered employer acting through a "labor organization," within the meaning of §2(5). Thus, for example, the reach of the NLRA law regarding "sec-

ondary" activity is determined by the identity of the employees and their union and does not turn on whether the complaining employer is covered by the Act. Compare *Teamsters Union* v. *New York N.H. & H.R. Co.*, 350 U.S. 155 (picketing of a non-covered employer (a railroad) governed by the NLRA because the concerted activity is by covered employees and their union), with *DiGiorgio Fruit Co.* v. *NLRB*, 191 F.2d 642 (C.A.D.C.) cert. denied 342 U.S. 869 (picketing of a covered employer not governed by the NLRA because the concerted activity is by a union of non-covered employees). More generally, the protections §7 affords workers, who are employees within §2(3) because of the status of their employer, apply even if the employer against whom they take concerted action is not covered by the Act. For, as Judge Learned Hand explained:

> "It is of course true that only those "employees" can invoke §7, who are defined by §2(3) * * * It follows that, so far as the * * * 'concerted activity' [was] for the 'mutual aid or protection' of farmers [not covered by the NLRA] on the one hand and the members of [the union of covered employers who undertook the activity] on the other, the section did not cover it. So far, however, as it was a 'concerted activity for the purpose' of the 'mutual aid or protection' of the members of [the union of covered employers who undertook the activity] themselves, the section did cover it, though perhaps the more accurate word in that situation would have been 'common' instead of 'mutual.' Certainly nothing elsewhere in the act limits the scope of the language to 'activities' designed to benefit other 'employees'; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his

> support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. * * * It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. Fort Wayne Corrugated Paper Co. v. National Labor Relation Board, 7 Cir., 111 F.2d 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e. g. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471, 472, 474) but it seems to us that the act has put an end to this." *NLRB* v. *Peter C. K. Swiss Chocolate Co.*, 130 F.2d 503, 505-506 (C.A.2).

In other words, §7 applies to concerted activity by covered employees the object of which is to enhance those employees' ability to secure improved terms and conditions from their own employers. That, of course, is the precise and only object of peaceful, primary, non-recognitional, area standards picketing. See pp. 3-8 *supra*. Indeed, it would be contrary to the logic and purposes of the Act, as well as the plain language of §7, to conclude that while Congress has granted covered employees the right to engage in such picketing against substandard employers also covered by the NLRA, it has denied those employees the right to engage in such picketing against non-covered substandard employers. The threat to the interests of covered em-

ployees posed by both classes of employers is precisely the same. The permission acknowledgely granted, reflects a Congressional determination that the interests of the picketing employees outweigh those of the picketed employer and his employees. And there is nothing to show that the countervailing interests of substandard employers not covered by the Act and their employees are more substantial than those of substandard employers and their employees who are covered.

(c) The lesson of the foregoing is that, as a general proposition, peaceful, primary, non-recognitional, area standards picketing by covered employees and their unions directed at a non-covered employer, creates a labor dispute governed by the NLRA; and, that such picketing is a "weapon of self-help, permitted by federal law" which state law can not "proscribe" (*Morton*, 377 U.S. at 259). The issue narrows, therefore, to whether the general rule is inapplicable where the picketed employer is not in commerce under the holding in *Benz* and the picketing is conducted by American seamen through their unions.

In approaching this issue we begin from the knowledge that *Benz*, *McCulloch*, and *Incres* do not mean that the NLRA is inapplicable simply because a foreign-flag vessel becomes involved in a domestic labor dispute precipitated by the efforts of covered American employees and their unions to protect their established terms and conditions of employment with American employers also covered by the Act. The Act does govern "peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports." *Longshore-*

men v. *Ariadne Co.*, 397 U.S. 195, 196. For, as the Court there explained, such a

> "dispute center[s] on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on [foreign-flag] vessels." *Id.* at 199-200, footnote omitted.

This Court's opinion in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, which involved precisely the concerted activity employed here (*id.* at 367-368), squarely holds that the controversy thus precipitated is a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq* (*id.* at 370). The definition of labor dispute in §2(9) of the NLRA is identical to that contained in §13 of Norris-LaGuardia. And in *Marine Cooks*, the Court went on to explain why such a labor dispute is "domestic," rather than (as in *Benz*) one which "interfere[s] in the internal economy of a vessel registered under the flag of a friendly foreign power:"

> "Unlike the situation in the Benz Case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the

> foreign employees as in Benz. Though the employer here was foreign, the dispute was domestic." 362 U.S. at 371 & n. 12.

In *Benz, McCulloch* and *Incres,* this Court declined to read American law so expansively as to grant the NLRB "jurisdiction * * * over labor relations already governed by foreign law," viz., the labor relations between a foreign-flag vessel and its alien crew. *Ariadne,* 397 U.S. at 199. In support of that construction of the Act, the Court emphasized that the Congressional intent in passing the NLRA was to protect American workers and not to enhance the rights of alien seamen:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. * * * The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that 'the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) HR Rep No. 245, 80th Cong, 1st Sess 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Benz,* 353 U.S. at 143-144, quoted and followed in *McCulloch,* 372 U.S. at 18-20.

Consistant with that emphasis, the Court in *Marine Cooks* and in *Ariadne* declined to read American law so narrowly as to deprive American workers, in job competi-

tion or otherwise affected by the labor policies of a foreign-flag vessel, of the rights enjoyed by all other American workers covered by the same protective provisions. And, just as it is true that there were "no discussion in either House of Congress * * * indicat[ing] in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed [in Benz]" (355 U.S. at 143), there is nothing in that legislative history, or in the language or structure of the NLRA to indicate that Congress intended to deprive covered American seamen and their unions of the right, essential in combating substandard competition, to engage in peaceful, primary, non-recognitional, area standard picketing, granted to the balance of American "employees" and "labor organizations" defined by §§2(3) & (5) of the Act.

3. The petitioners invite this Court to reconsider its holding in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245, that "When an activity is arguably subject to §7 or §8 of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board." Pet. Br. pp. 27-29. There is no occasion to do so.

The major issue in this proceeding is whether the picketing which occurred here precipitated a labor dispute covered by the NLRA. In that respect the problem presented is exactly parallel to that the Court confronted in the *Ariadne* case. In *Ariadne* the Court itself determined that the NLRA governed; it did not withhold final resolution of that question of coverage pending a determination by the NLRB. 397 U.S. at 198-200. In light of the Court's approach in *Ariadne*, we have argued in this case, that this labor dispute *is* covered by the NLRA, and not that it is "argu-

ably" subject to that Act. Once it is determined that this dispute is regulated by the Act, there can be no doubt that concurrent state regulation based on the theory that union action which tends to interfere with contractual relationships is a tort (see A. 128), would "upset the balance of power between labor and management expressed in our national policy" (*Morton*, 377 U.S. at 260). Accordingly, as recognized in *Ariadne* (in the majority opinion on the authority of *Garmon*, 397 U.S. at 200-201, in the concurrence on the authority of *Garner*, *id.* at 207-202), the states are without jurisdiction over the controversy.[7]

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[7] The Petitioners have made no claim here that the picketing was violent, obstructive, that it constituted a trespass, or pointed to any other factor "touching interests • • • deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244; cf., *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223.

CONCLUSION

For the above noted reasons, as well as those stated in the brief of the respondent unions, the judgment below should be affirmed.

Respectfully submitted,

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